82 - 1749

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Petitioner,

v.

GEORGE C. KELLY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Paul A. Howell, Jr.
Counsel of Record
W. Stell Huie
KUTAK ROCK & HUIE
1200 Standard Federal Savings Building
Atlanta, Georgia 30303
(404) 522-8700

Frances M. Toole
Brenda K. Pollard
MARTA Office of Staff Counsel
2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlanta, Georgia 30365-4301
(404) 586-5220

Attorneys For Petitioner

Dated: April 25, 1983

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TRANSIT AUTHORITY,

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W. Stell Huie
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Atlanta, Georgia 30303
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Brenda K. Pollard
MARTA Office of Staff Counsel
2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlanta, Georgia 30365-4301
(404) 586-5220

Attorneys For Petitioner

Dated: April 25, 1983

QUESTION PRESENTED FOR REVIEW

May an employee maintain an action against his employer for employment discrimination on the basis of handicap under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, if his employer receives no federal financial assistance a primary purpose of which is to provide employment?

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO._____

METROPOLITAN ATLANTA RAPID
TRANSIT AUTHORITY,

Petitioner,

v.

GEORGE C. KELLY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY (hereinafter "MARTA"), respectfully prays that a writ of certiorari issue to review the decision

of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported. It appears in the Appendix, infra, at p. A-1. The judgment of the Court of Appeals appears in the Appendix at p. A-2. The opinion of the United States Court of Appeals for the Eleventh Circuit reversed the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division and remanded the case for further proceedings. The opinion and judgment of the district court is not reported and appears in the Appendix, infra, at p. A-3.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was rendered January 25, 1983. This Petition for Writ of Certiorari was filed within ninety (90) days from January 25, 1983. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794:

> No otherwise qualified handicapped individual in the United States as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied

the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794a:

> (a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accomodation, and the availability of alternatives therefor or other appropriate relief in order

to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 601 of the Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d:

No person in the United States shall, on the ground of race, color,

or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 604 of the Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d-3:

> Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

STATEMENT OF THE CASE

Petitioner Metropolitan Atlanta Rapid Transit Authority (hereinafter "MARTA") is

a public body corporate and joint instrumentality of the City of Atlanta, Georgia and several counties in the metropolitan Atlanta area. Ga. Laws 1965, pp. 2243 et seq. MARTA was created by the General Assembly of the State of Georgia in 1965 for the purpose of providing rapid transit services to the metropolitan Atlanta area. MARTA receives federal financial assistance in the form of engineering and construction grants and operating subsidies from the Urban Mass Transportation Administration ("UMTA"), an agency of the United States Department of Transportation. The primary objectives of these funds are to assist in the development of improved mass transportation facilities and equipment; to encourage the planning and establishment of area wide mass transportation systems; and to assist states and

local governments and their instrumentalities in financing such systems. Providing employment is not a primary objective of these funds, although some operating subsidies received by MARTA may be, but are not necessarily, used to pay the salaries of traffic checkers. MARTA receives no federal financial assistance other than funds provided through UMTA.

Respondent George C. Kelly (hereinafter "Kelly") was employed by MARTA as a bus operator until 1975 when he suffered a heart attack. MARTA reassigned Kelly to a position as a traffic checker, a job which does not involve the operation of a bus, in 1976. In April, 1977 Kelly underwent back surgery. Kelly's employment with MARTA as a traffic checker was terminated July 15, 1977 because Kelly was unable to perform the duties of a traffic checker.

On June 26, 1981, Kelly filed suit against MARTA in the United States District Court for the Northern District of Georgia, alleging that MARTA had discriminated against him on the basis of his handicap in violation of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794. Kelly invoked the jurisdiction of the district court under 28 U.S.C. § 1331, federal question jurisdiction.

MARTA filed a motion for summary judgment or, in the alternative, for partial summary judgment on the grounds, inter alia, that Kelly lacked standing to sue for employment discrimination on the basis of handicap under 29 U.S.C. §794; that Kelly lacked standing to sue under 42 U.S.C. 2000e-3(a) (Title VII of the Civil Rights Act of 1964); and that Kelly had failed properly to pursue administrative remedies under Title VII. The

Honorable William C. O'Kelley granted MARTA's motion for summary judgment on March 31, 1982, holding that Kelly lacked standing to sue for employment discrimination on the basis of handicap under 29 U.S.C. §794 because providing employment was not a primary objective of the federal funds which MARTA received. The district court's order was consistent with the decisions of those courts of appeals which had addressed this issue to that date.

Kelly appealed to the Court of Appeals for the Eleventh Circuit, which reversed the decision of the district court on January 25, 1983 and remanded the case for further proceedings. The decision was based upon its holding in Jones v. MARTA, 681 F.2d 1376, a recent decision of the court on an identical issue. MARTA has petitioned for a writ of certiorari to

the 11th Circuit's opinion in that case and that petition is presently pending before this Court. MARTA v. Jones, petition for cert. filed, 51 U.S.L.W. 3535 (Jan. 11, 1983) (No. 82-1159).

REASONS FOR GRANTING THE WRIT

This Court has recognized the need for its guidance in the area of employment discrimination under § 504 of the Rehabilitation Act of 1973 by its grant of a petition for certiorari in a case arising out of the Third Circuit, Consolidated Rail Corp. v. LeStrange, cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983) (No. 82-862). This guidance is necessary because of an existing split between the circuits on an important question of federal law which has not yet been settled by this Court. This split was created by the Third

Circuit's decision in Consolidated Rail Corp. and the Eleventh Circuit's decisions in the instant case and in Jones v. MARTA, 681 F.2d 1376 (1982), petition for cert. filed, 51 U.S.L.W. 3535 (Jan. 11, 1983) (No. 82-1159). Prior to these three decisions, those courts of appeals which had reviewed the issue were in accord.

I. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF FOUR OTHER CIRCUIT COURTS ON THE QUESTION PRESENTED HERE.

The decision of the Court of Appeals for the Eleventh Circuit in the instant case is in direct conflict with decisions of the Second, Fourth, Eighth and Ninth Circuits on the same issue.[1/] If the decision below is allowed to stand, then a class of plaintiffs will have been created

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1 U.S. v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892 (1980); Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982).

in the Eleventh and Third Circuits which does not exist in these other circuits.[2/]

It is clear that employment is not a primary objective of the federal financial assistance which MARTA receives. Urban Mass Transportation Act, 49 U.S.C. § 1601, § 1601a and § 1601b. It should be equally clear that employment must be a primary objective of the federal financial assistance received by an employer if an employee is to have standing to assert a claim for employment discrimination under Section 504. The Rehabilitation Act was amended in 1978 to incorporate the "rights,

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2 As noted above, the Court of Appeals for the Third Circuit, in LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983) (No. 82-862), concluded that Section 504 reaches employment discrimination and provides a private cause of action to redress it regardless of the intended use of the federal financial assistance.

remedies and procedures" of Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a. Title VI limits its remedies and rights, with respect to employment practices, to instances where "a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3, Section 604 of the Civil Rights Act of 1964. By virtue of the 1978 Amendments to the Rehabilitation Act, this limitation was expressly incorporated into Section 504 and restricts actions for employment discrimination based on handicap to those programs where employment is a primary objective of the federal assistance. 29 U.S.C. § 794a.

Four courts of appeals have considered this issue and held that Section 504 actions for employment discrimination based on handicap are limited to instances

where a primary objective of the assistance is to provide employment. In Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (1978), cert. denied, 442 U.S. 947 (1979), the Fourth Circuit Court of Appeals construed the incorporation of the "remedies, procedures, and rights" of Title VI into Section 504 of the Rehabilitation Act to include the limitation of Section 604 of Title VI that a primary objective of the federal assistance must be employment. Its reasoning was based on the distinction between Sections 501 and 504 made by Congress in passing the 1978 Amendments to the Rehabilitation Act. Congress incorporated the remedies, procedures and rights of Title VII of the Civil Rights Act of 1964 into Section 501, yet incorporated the remedies, procedures and rights of Title VI into Section 504. Reasoning that

such a distinction "could not have been inadvertent," the court concluded it must "apply the limitation contained in § 604 of Title VI to § 504 of the Rehabilitation Act in literal compliance with Section 120(a) of the 1978 amendments." 590 F.2d at 89. The instant case is in direct conflict on the issue, thus creating a class of litigants in the Eleventh Circuit that does not exist in the Fourth Circuit.

The Trageser analysis has been adopted by three other courts of appeals.[3/] The Court of Appeals for the Eighth Circuit has also analyzed Congress'

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3 Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982); U.S. v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892 (1980). The Seventh Circuit appears to have adopted the Trageser analysis insofar as it requires a plaintiff to demonstrate that a primary objective of the federal funds is the provision of employment. Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980).

incorporation of Title VI, including the limitation of Section 604, into Section 504 of the Rehabilitation Act and reached the same conclusion as the Trageser court. Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672, 674-75 (8th Cir. 1980), cert. denied, 449 U.S. 892 (1980). The Carmi court determined that the legislative history of Title VI indicated clearly that Congress intended to limit private actions for employment discrimination under Title VI to those instances where a primary purpose of the federal financial assistance was the provision of employment and that this limitation was incorporated into the Rehabilitation Act by the 1978 Amendments. 620 F.2d at 674-75.

In U.S. v. Cabrini Medical Center, 639 F.2d 908 (1981), the Court of Appeals for the Second Circuit, after analyzing

the literal language of the statute, interpreted the 1978 amendments to include the limitation found in Section 604 of Title VI.[4/] The Court of Appeals for the Ninth Circuit has likewise determined that an action for employment discrimination brought pursuant to Section 504 is limited to those instances where a primary objective of the federal financial assistance involved is to provide employment. Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (1982).

The decisions of the Court of Appeals for the Eleventh Circuit fly in the face of the decisions of at least three other

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4 The Second Circuit opinion did not address the issue of the application of Section 604 of Title VI to individual plaintiffs, inasmuch as the plaintiff in this action was the United States of America for the Office of Civil Rights of the Department of Health and Human Services.

circuits. Nevertheless, it has made no attempt to distinguish or otherwise reconcile its decisions in Jones or the instant case with those of the other circuits, but merely disagrees with the results of those cases. The decisions create a group of plaintiffs who have standing to assert claims for employment discrimination based on handicap in the Eleventh Circuit but which can not assert the same claim in the Second, Fourth, Eighth or Ninth Circuits and disrupts, without reason, a clearly established line of cases. An employer which receives federal funds and has facilities located in different circuits will face uncertain and inconsistent results which are dependent not on the law, but on the vagaries of the jurisdiction in which suit is brought, thus encouraging parties to engage in forum shopping. Moreover, this division between

the circuits creates a confused and unsettled interpretation of the rights, remedies and procedures available under the Rehabilitation Act which should be resolved by this Court.

II. WHETHER A PRIVATE RIGHT OF ACTION MAY BE IMPLIED UNDER SECTION 504 OF THE REHABILITATION ACT, AND, IF SO, WHICH PERSONS HAVE STANDING TO ASSERT A CLAIM, ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

MARTA argued to the district court that no private right of action for damages may be implied under Section 504. The district court did not expressly address this issue. It appeared settled at that time that a private right of action for declaratory and injunctive

relief did exist under Section 504. The Eleventh Circuit certainly assumed that such an action existed. Jones v. MARTA, 681 F.2d 1376, 1377 n. 1 (1982). See also Prewitt v. United States Postal Serv., 662 F.2d 292, 302 (1981). This Court had declined to address whether a private right of action was created by the Rehabilitation Act in Southeastern Community College v. Davis, 442 U.S. 397, 404-5 n. 5 (1979).

Several Justices have recently expressed concern whether Title VI creates a private cause of action for an alleged violation of that Act. Guardians Assoc. v. Civil Service Commission of the City of New York, cert. granted, 50 U.S.L.W. 3547 (Jan. 11, 1982) (No. 81-431 & 81-432). During oral argument in the Guardians Association case, Mr. Justice Powell suggested that the Court must first decide

whether a private right of action was implied under Title VI in order for the suit to proceed. (Transcript of Oral Argument, November 1, 1982, at 36). The concern expressed by this Court during oral argument reveals that doubt exists whether there is an implied private cause of action under Title VI. If Title VI does not create an implied private right of action, then there is no implied right of action under the Rehabilitation Act by virtue of the 1978 Amendments to the Rehabilitation Act. 29 U.S.C. § 794a. Whether an implied private right of action exists under Section 504 of the Rehabilitation Act is fundamental to the instant case and should be addressed by this Court. "This Court . . . should be extremely reluctant to imply a cause of action absent" specific legislative direction. Cannon v. University of

Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, concurring).

Assuming a private right of action exists under Section 504, it is not without bounds. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretations." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951). Thus, the scope of a private right of action, if it exists, is subject to limitation. The implied right of action must not be expanded by the judiciary beyond the intentions of Congress. This Court has not addressed the breadth of any implied private right of action under Section 504 with respect

to actions for employment discrimination.[5/] This is a question of obvious importance to all recipients of federal financial assistance and their employees.

Presently the courts of appeals use four conflicting tests to determine whether a plaintiff has standing to assert a claim for employment discrimination on the basis of handicap under Section 504. As discussed above, the Second, Fourth, Eighth and Ninth Circuits have determined that a plaintiff must demonstrate that the provision of employment is a primary objective of the federal assistance

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5 As noted above, this Court recently granted certiorari in Consolidated Rail Corp. v. LeStrange, cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983) (No. 82-862). Prior to that, the Supreme Court had twice denied certiorari on this question, in the Trageser and Carmi decisions; however, no conflict between the circuits existed at the time those petitions for certiorari were filed.

received by his employer in order to have standing.[6/]

The Fifth Circuit requires merely that a plaintiff "show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance." Brown v. Sibley, 650 F.2d 760, 769 (1981). In Doyle v. University of Alabama in Birmingham, 680 F.2d 1323 (1982), a case decided by the Eleventh Circuit shortly before the Jones and the instant case, the court purported to follow the "nexus" test of Brown v. Sibley.

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6 The Seventh Circuit also appears to require a plaintiff to demonstrate that the provision of employment is a primary objective of the federal assistance. Simpson v. Reynolds Metal Co., 629 F.2d 1226 (1980). Assuming a finding that employment is a primary objective, the Seventh Circuit then requires the plaintiff to prove that he was an applicant for, or participant in, the program for which federal assistance was provided.

In Jones v. MARTA, 681 F.2d 1376, 1382 (1982), the Eleventh Circuit deviated from the "nexus" test and, instead established a third test, holding that a plaintiff must demonstrate only that "he was an intended beneficiary of the assistance" received by his employer.

Finally, the fourth test is, in essence, no test at all. The Third Circuit has held that all employees of an employer receiving federal financial assistance have standing to assert a claim of handicap discrimination in employment regardless of the use, or intended use, of the funds received by his employer. LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983) (No. 82-862).

The standing requirements for bringing claims pursuant to Section 504 are currently in a state of complete confusion

and the courts of appeals are interpreting the same federal statutes in directly conflicting ways. Clear direction from this Court is needed, and MARTA submits that the litigants and the lower courts need the prompt assistance of this Court in resolving this important federal question.

CONCLUSION

On the basis of the foregoing, a Writ of Certiorari should be issued to review the judgment and opinion of the Eleventh Circuit and, upon review, this Court is requested to reverse that decision.

Respectfully submitted,

METROPOLITAN ATLANTA
RAPID TRANSIT AUTHORITY

Counsel of Record
Kutak Rock & Huie
1200 Standard
Federal Savings
Building
Atlanta, GA 30303
(404) 522-8700

Paul A. Howell, Jr.
Paul A. Howell, Jr.

Counsel of Record

W. Stell Huie
W. Stell Huie

MARTA Staff Counsel
2200 Peachtree
Summit Building
Atlanta, GA 30365
(404) 586-5220

Frances M. Toole
Frances M. Toole

Brenda K. Pollard
Brenda K. Pollard

Attorneys For Petitioner

Dated: April 25, 1983

APPENDIX A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-8314
Non-Argument Calendar

GEORGE C. KELLY,

Plaintiff-Appellant,

versus

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Georgia

(January 25, 1983)

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

On the authority of Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376 (11th Cir. 1982) (petition for rehearing and rehearing en banc denied Oct. 13, 1982), we reverse the entry of summary judgment and remand this case to the district court for further proceedings.

REVERSED and REMANDED

APPENDIX A-2

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-8314
Non-Argument Calendar

D.C. Docket No. 053E-1

GEORGE C. KELLY,

Plaintiff-Appellant,

versus

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United

States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

January 25, 1983

ISSUED AS MANDATE: MAR 08, 1983

APPENDIX A-3

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. C81-1228A

GEORGE C. KELLY,

Plaintiff,

vs.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Defendant.

This action came on for consideration before the Court, Honorable WILLIAM C. O'KELLEY, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff take nothing, that the action be

dismissed, and that the Defendant, METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, have and recover of Plaintiff GEORGE C. KELLY its costs of action.

Dated at Atlanta, Georgia, this 31st day of March, 1982.

FILED AND ENTERED
IN CLERK'S OFFICE
MARCH 31, 1982
BEN H. CARTER, CLERK

By s/s A. Burns
Deputy Clerk

BEN H. CARTER,
Clerk of Court

By /s/ A. Burns
A. Burns, Deputy
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGE C. KELLY	)	
	)	CIVIL NO.
VERSUS	)	
	)	C-81-1228-A
METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY (MARTA)	)	

ORDER

On October 26, 1974, the Metropolitan Atlanta Rapid Transit Authority ("MARTA") employed George C. Kelly as a bus operator. Mr. Kelly suffered a heart attack in 1975 and was reassigned to a position as a traffic checker in July of 1976. On or about April 4, 1977, Mr. Kelly underwent surgery for lumbar disc disease. While the defendant denies that Mr. Kelly was "awarded" a leave of absence with payment of short term disability benefits because of the surgery, it admits that Mr. Kelly was on a medical leave of

absence and was receiving short-term disability benefits from late 1976 until May of 1977. The plaintiff's short term disability benefits expired in May of 1977; thereafter, Mr. Kelly received long term disability benefits until he was notified by MARTA that his employment would be terminated effective July 15, 1977. Mr. Kelly was also notified that he would continue to receive disability benefits.

On or about May 12, 1977, Mr. Kelly's neurosurgeon sent a letter to MARTA indicating that, while he believed Mr. Kelly was unable to return to the work he had performed previously, he could return to work if he was placed in a position which did not require any heavy lifting, bending or prolonged standing. From September of 1978 until December of 1980, Mr. Kelly sought to be rehired by MARTA and applied for a number of openings, including the position of traffic checker.

His applications were denied on the basis of his previous disability and his present medical limitations. In December of 1980, MARTA offered Mr. Kelly a position as traffic checker on the condition that he pass a medical examination and sign a release of any outstanding "504" complaints he had instituted against MARTA. Mr. Kelly rejected this offer on December 11, 1980.

On June 26, 1981, the plaintiff instituted this action requesting declaratory and injunctive relief to redress MARTA's alleged violations of § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and 42 U.S.C. § 2000e et seq. In his complaint the plaintiff contends that MARTA discriminated against him on the basis of his handicap by refusing to provide reasonable accommodations for his handicap, to restructure the job to accommodate his needs, or to place him in an alternative position. Mr. Kelly contends

that MARTA violated 49 C.F.R. § 27.37 in making, discovering, using and relying on pre-employment inquiries as to whether he is handicapped and as to the nature and the severity of any handicap. In addition, the plaintiff alleges that MARTA discriminated against him because he filed a § 504 complaint with the United States Department of Transportation, Urban Mass Transportation Administration.

Presently pending before the court are (1) the defendant's motion to strike the plaintiff's demand for a jury trial, (2) the defendant's motion for summary judgment or in the alternative for partial summary judgment, (3) the defendant's motion to dismiss the plaintiff's demand for back pay, and (4) the plaintiff's motion to compel discovery. The court held a hearing on the above-stated motions on December 9, 1981, at which both parties appeared and presented oral argument.

Because a favorable ruling on the defendant's motion for summary judgment would render the remaining motions moot, the court will consider it first.

In support of its motion for summary judgment, the defendant argues that the plaintiff lacks standing to bring this action under § 504 of the Rehabilitation Act of 1973. In 1978, Congress amended § 504 of the Rehabilitation Act to provide that the rights, remedies and procedures set forth in Title VI of the Civil Rights Act of 1964 were available to any person aggrieved by violations of § 504 of the Rehabilitation Act. Section 604 of Title VI provides that "[n]othing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of

the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3. The defendant reasons that the limitations contained in § 604 of Title VI operate to restrict the reach of § 504 and that therefore the plaintiff may not recover under § 504 unless a primary objective of the federal financial assistance to MARTA is to provide employment. In various affidavits submitted in support of its motion for summary judgment, the defendant shows that the federal assistance received by MARTA is in the form of engineering and construction grants and operating subsidies pursuant to the Urban Mass Transportation Act, 49 U.S.C. § 1601 et seq. ("UMTA"). Sections 1601, 1601a and 1601b of the UMTA contain Congress' declaration of the findings and purposes of the Act. Providing employment is not among them. Consequently, the defendant argues that providing employment is not a primary

purpose of the federal financial assistance it receives and that therefore the plaintiff lacks standing to maintain this suit under § 504 of the Rehabilitation Act of 1973, as amended.

The defendant also argues that the plaintiff lacks standing under Title VII, 42 U.S.C. § 2000e-3(a) to bring an action alleging unlawful retaliation. In addition, MARTA argues that, should the court determine that Mr. Kelly has standing to bring a retaliation claim under Title VII, he is foreclosed from relief under Title VII because of his failure to file a timely charge with the EEOC.

The plaintiff concurs with the defendant that the rights, remedies and procedures of Title VI of the Civil Rights Act of 1964 are applicable to § 504 of the Rehabilitation Act of 1973. The plaintiff differs, however, with the defendant's contention that the

plaintiff may not recover from the defendant unless a primary objective of the federal financial assistance is to provide employment. He rather contends that, since one must be an "intended beneficiary" of the federal financial assistance in order to recover under Title VI of the Civil Rights Act of 1964, one must also be an "intended beneficiary" of the federal financial assistance in order to state a claim for relief under § 504. Mr. Kelly contends that 49 U.S.C. § 1609(c), entitled "Labor Standards" evidences Congress' intent to make employees of sponsored projects "intended beneficiaries" under the UMTA. It states that "[i]t shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." 49 U.S.C. § 1609(c).[1] Because § 1609(c) specifically recognizes that

employees of sponsored projects are affected by the financial assistance granted pursuant to the Act and that it is a condition of any such assistance that the interests of those employees shall be protected, the plaintiff argues that employees of a program or activity which is given financial assistance pursuant to the UMTA are "intended beneficiaries" of the federal financial assistance. The plaintiff buttresses his argument by pointing out that in the various operating assistance grant contracts between MARTA and the Urban Mass Transit Administration, MARTA has undertaken to provide equal employment opportunities and to practice non-discrimination as to all of its employees.[2] The plaintiff further contends that regulations promulgated by the Secretary of Transportation suggest that employees of projects sponsored under the UMTA are subject to the Secretary's regulations providing for non-discrimination in federally assisted

programs.[3] The plaintiff argues that the construction of a statute by the agency charged with its administration is entitled to great weight and that the Secretary's interpretation that employees of projects sponsored under the UMTA are subject to Title VI is further evidence that Congress intended employees of sponsored projects to be beneficiaries under the Act. Finally, the plaintiff argues that it is inconceivable that Congress ever intended to grant financial assistance to programs or activities which, while they did not permit discrimination against the users of the facilities, did permit discrimination against the employees of the program or activity which provides the facilities and services to the users.

In response to the defendant's argument that Mr. Kelly has no standing to assert a violation under 42 U.S.C. § 2000e et seq., Mr. Kelly argues that MARTA's "admitted

action" in requiring him to release the defendant from all claims which he had against it as a condition of reemployment is a violation of 49 C.F.R. § 27.123(e) and not 42 U.S.C. § 2000e et seq. The plaintiff concedes that he referred to the wrong statute in its complaint; he argues, however that it is not necessary for a party to plead the statute upon which it relies in asserting its claim for relief. It is enough, he argues, if the party pleads the grounds upon which it bases its claims for relief. The plaintiff contends that the facts stated in his complaint state a claim for relief under 49 C.F.R. § 27.123(e),[4] and that exhibits "O" and "P" attached to plaintiff's first request for admissions allege facts which are sufficient to state a prima facie violation of that regulation.

Countering these arguments, the defendant argues that the plaintiff is not an

intended beneficiary of federal financial assistance by virtue of 49 U.S.C. § 1609(c). MARTA contends that, at the most, § 1609(c) acknowledges that employees of sponsored projects are affected by federal financial assistance but argues that this acknowledgement is not tantamount to a finding that providing employment is a primary purpose of the Act. MARTA contends that § 1609(c) merely reflects Congress' intent to preserve any collective bargaining rights that employees may have at the time the grant is made; it argues that this does not alter the primary purposes of the UMTA which are enumerated in 49 U.S.C. §§ 1601, 1601a, and 1601b. MARTA agrees with Mr. Kelly that the court should give deference to the agency's interpretation of its own statute, but points out that Appendix B to 49 C.F.R. Part 21, entitled "[a]ctivities to which this part applies when a primary objective of the

federal financial assistance is to provide employment," cites only one such circumstance: programs or activities sponsored under the Appalachia Regional Development Act. Finally, MARTA argues that Mr. Kelly does not have a private cause of action under 49 C.F.R. § 27.123(e), noting that federal regulations cannot extend the obligations imposed by the statute under which they are promulgated. MARTA argues that Title VI, as opposed to Title VII, contains no retaliatory provision and thus that the portion of Mr. Kelly's complaint which alleges an unlawful employment practice resulting from retaliatory acts must therefore be dismissed.

In rebuttal, the plaintiff argues that, while 49 U.S.C. § 1601, 1601a and 1601b of the UMTA state findings and purposes of the Act, those provisions do not contain an exclusive listing of the primary purposes of the Act. The plaintiff argues that another

objective of the Act may be found in 49 U.S.C. § 1609(c), entitled "Labor Standards." Mr. Kelly contends that providing employment is a primary objective of the Act because, under § 1609(c) it is a condition of assistance under § 1602 of the Act that fair and equitable arrangements are made to protect the interests of employees affected by such assistance. Finally, the plaintiff argues that he has a private right of action under § 504 of the Rehabilitation Act and therefore also has a private right of action under 49 C.F.R. § 27.123(e).

The court has carefully reviewed the arguments presented by both parties, the pertinent statutes and regulations, and the relevant case law and concludes that the plaintiff lacks standing to sue MARTA under § 504 of the Rehabilitation Act of 1973 or under any of the regulations promulgated thereunder. The court therefore concludes

that the defendant is entitled to summary judgment on all claims as a matter of law.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Although Congress patterned § 504 after Title VI of the Civil Rights Act of 1964 and § 901 of the Education Amendments of 1972, see S.Rep. No. 93-1297, 93d Cong., 2d Sess.

39, reprinted in [1974] U.S. Code Cong. & Ad. News, 6373, 6390, it did not provide an enforcement mechanism for the rights created thereunder. To remedy this situation, Congress passed § 120(a) of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, which, among other things, added subsection 505(a)(2), 29 U.S.C. § 794a(a)(2), to the Rehabilitation Act. Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under § 504 of this Act.

Therefore, one must look to the provisions of Title VI of the Civil Rights Act of 1964 to determine the remedies, procedures, and rights of the plaintiff.

Section 601 of Title VI, 42 U.S.C. § 2000d, the legislative analogue to § 504, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 601 is limited, however, by § 604 of Title VI, 42 U.S.C. § 2000d-3 which provides:

> Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

In contrast, § 120(a) of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978 added § 505(a)(1), 29 U.S.C. § 794a(a)(1), to the Rehabilitation Act which makes various remedies, procedures and rights of Title VII available to federal employees who allege discrimination in employment on the basis of a handicap in violation of § 501 of the Rehabilitation Act.

In light of the restrictions contained in § 604 of Title VI and the fact that Title VII provides the primary statutory remedies for discrimination in employment, courts juxtaposing §§ 505(a)(1) and (a)(2) of the Rehabilitation Act have almost unanimously concluded that Congress chose to burden § 504 with the restrictions imposed by § 604 of Title VI and that, consequently, complainants alleging handicapped discrimination in employment pursuant to § 504 must show that the purpose of the federal financial assistance to the program or activity is to provide employment. Simon v. St. Louis County, Mo., 656 F.2d 316, 319 n.6 (8th Cir. 1981) (cert. granted); United States v. Cabrini, 639 F.2d 908 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980);[5] Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir.), cert. denied, 449 U.S. 892 (1980); Trageser v.

Libbie Rehab. Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979); Jones v. Metropolitan Atlanta Rapid Transit Authority, 522 F.Supp. 370 (N.D. Ga. 1981); Miller v. Abilene Christian University of Dallas, 517 F.Supp. 437 (N.D. Tex. 1981); Sabol v. Bd. of Ed. of Tp. of Willingboro Cty., 510 F.Supp. 892 (D. N.J. 1981); LeStrange v. Consolidated Rail Corp., 501 F.Supp. 964 (M.D. Penn. 1980); Brinkley v. Dept. of Public Safety, No. C-75-157-R (N.D. Ga. 1980).[6] Contra, Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979); Comment, Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action?, 54 N.Y.U.L.Rev. 1173 (1979).[7] The courts have so ruled in spite of the fact that § 604 of Title VI only speaks in terms of agency action. The cases explain in varying degrees of detail why § 604 restricts private suits as well as

agency action. See Traqeser v. Libbie Rehabilitation Center, 590 F.2d 87, 89 (4th Cir. 1978) (no discussion), cert. denied, 442 U.S. 947 (1979); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672, 674-75 (8th Cir. 1980) (legislative history of Title VI indicates that Congress did not intend to extend Title VI's protection to persons other than beneficiaries of federal financial assistance); Jones v. Metropolitan Atlanta Rapid Transit Authority, 522 F.Supp. 270, 374 (N.D. Ga. 1981) (Fifth Circuit's holding in United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966) supported reasoning in Traqeser and Carmi). Accord, Association Against Discrimination, 647 F.2d 256 (2d Cir.) (limitations contained in § 604 apply to private actions brought under Title VI), cert. denied, 102 S.Ct. 397 (1981).

The common thread implicit in the various rationales is that, in passing § 604, Congress expressed its intention that Title VI is not the proper statutory vehicle to remedy employment discrimination. This court agrees. Title VI, in contrast to Title VII, is simply not designed to regulate employment discrimination in the work force. Congress made an exception for those instances in which the primary objective of the federal financial assistance is employment. Thus, in order to have standing to bring suit under Title VI, and thus under § 504 of the Rehabilitation Act, a plaintiff must show that a primary objective of the federal financial assistance is to provide employment. See United States v. Jefferson County Board of Education, 373 F.2d 836 (5th Cir. 1966) (section 604 of the Civil Rights Act of 1964 limits the applicability of Title VI to discrimination against the beneficiaries of

the federally assisted programs and does not apply to discrimination against employees of federally assisted programs unless the employees are the intended beneficiaries of the program).[8]

The sole remaining question therefore is whether a primary purpose of UMTA's financial assistance to MARTA is to provide employment. The court concludes that it is not. The findings and purposes of the UMTA and the assistance granted pursuant thereto are included in §§ 1601, 1601a and 1601b, which read as follows:

> § 1601. Declaration of findings and purposes
>
> (a) The Congress finds --
>
> (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
>
> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas,

and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are -

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

§1601a. Additional declaration of findings and purpose

The Congress finds that the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at a reasonable cost an urgent national problem; that it is imperative, if efficient, safe, and convenient transportation compatible with soundly planned urban areas is to be achieved, to continue and expand this chapter; and that success will require a Federal commitment for the expenditure of at least $10,000,000,000 over a twelve-year period to permit confident and continuing local planning, and greater flexibility in program administration. It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements.

§1601b. Additional declaration of findings

The Congress finds that --

(1) over 70 per centum of the Nation's population lives in urban areas;

(2) transportation is the lifeblood of an urbanized society and the health and welfare of that society depends upon the provision of efficient economical and convenient transportation within and between its urban areas;

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons;

(6) some urban areas are now engaged in developing preliminary plans for, or are actually carrying out, comprehensive projects to revitalize their mass transportation operations; and

(7) immediate substantial Federal assistance is needed to enable many mass transportation systems to continue to provide vital service.

These findings and purposes contain no stated or implied purpose to provide employment. The court finds nothing in § 1609(c) to the contrary. At most, § 1609(c) recognizes that employees of the sponsored project

are affected by the federal financial assistance. The court does not believe that such recognition alters Congress' stated purposes for the appropriation of public funds. If courts held that congressional recognition that financial assistance under an act would affect employees was tantamount to an expression of intent that providing employment was a primary purpose of the act, § 604 would lose much of its force. The court does not believe this is what Congress intended. Cf. Olsen v. Shell Oil Co., 561 F.2d 1178, 1186-87 (5th Cir. 1977), cert. denied, 444 U.S. 979 (1979) (existence of pervasive legislative scheme governing the relationship between platform workers and lessees under the Outer Continental Shelf Lands Act would not satisfy requirement that a primary purpose of the Act be the protection of platform employees when Congress specifically

outlined the purposes behind the legislation). Accordingly, and for the above-stated reasons, the court concludes that Mr. Kelly lacks standing to bring suit against MARTA under § 504 of the Rehabilitation Act of 1973.

With respect to Mr. Kelly's contention that MARTA violated 49 C.F.R. 27.123(e), the court agrees with the plaintiff that an implied private cause of action exists to enforce § 504 of the Rehabilitation Act. Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981); Cameninish v. University of Texas, 616 F.2d 127 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981). The court disagrees, however, that the plaintiff has standing to bring suit for violations of regulations promulgated thereunder. A regulation cannot extend the obligations imposed under the statute under which it is promulgated. Real v. Simon, 510 F.2d 557 (5th Cir. 1975) (administrative agency has no power to

create a rule or regulation that is out of harmony with its grant of authority). See Stark v. Wickard, 321 U.S. 288, 309-10 (1944). Therefore, the regulations contained in 49 C.F.R. Part 27, like their parent statute, do not apply to employment practices unless a primary objective of the federal financial assistance to the sponsored project is to provide employment. Accord, Jones v. Metropolitan Atlanta Rapid Transit Authority, 522 F.Supp. 370 (N.D. Ga. 1981). Accordingly, the court concludes that there is no genuine issue of material fact and that the defendant is entitled to summary judgment as a matter of law on the ground that the plaintiff lacks standing to bring this action. The defendant's motion to strike the plaintiff's demand for a jury trial, the defendant's motion to strike the plaintiff's demand for back pay, and the plaintiff's motion to compel discovery are denied as

moot. The clerk is hereby directed to enter judgment in favor of the defendant.

IT IS SO ORDERED this 31st day of March, 1982.

/s/ William C. O'Kelley

WILLIAM C. O'KELLEY

United States District Judge

1 Section 1609(c) goes on to state:

> Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of

reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

[2] At one point in his brief, the plaintiff seems to argue that MARTA is estopped from denying that its employees are intended beneficiaries under the UMTA because it agreed in its contracts not to discriminate against its employees and to comply with the requirements imposed by Title VI of the Civil Rights Act of 1964 and the regulations promulgated by the Department of Transportation pursuant thereto. The plaintiff also notes that MARTA passed a resolution providing for non-discrimination against the handicapped including employment in its programs and activities.

[3] In implementing Title VI of the Civil Rights Act of 1964, the Secretary of Transportation promulgated Title 49, Subtitle A, Part 21 of the Code of Federal Regulations. Appendix C, entitled "APPLICATION OF PART 21 TO CERTAIN FEDERAL FINANCIAL ASSISTANCE OF THE DEPARTMENT OF TRANSPORTATION," states:

(a) Examples. The following examples, without being exhaustive, illustrate the application of the nondiscrimination provisions of this part on projects receiving Federal financial assistance under the programs of certain Department of Transportation operating administrations:

. . . .

(3) Urban Mass Transportation Administration.

(i) Any person who is, or seeks to be, a patron of any public vehicle which is operated as a part of, or in conjunction with, a project shall be given the same access, seating, and other treatment with regard to the use of such vehicle as other persons without regard to their race, color, or national origin.

(ii) No person who is, or seeks to be, an employee of the project sponsor or lessees, concessionaires, contractors, licensees, or any organization furnishing public transportation service as a part of, or in conjunction with, the project shall be treated less favorably than any other employee or applicant with regard to hiring, dismissal, advancement, wages, or any other conditions and benefits of employment, on the basis of race, color or national origin.

4 In implementing § 504 of the Rehabilitation Act of 1973, the Secretary of Transportation promulgated Title 49, Subtitle A, Part 27, Subpart F of the Code of

Federal Regulations. Section 27.123(e) provides in pertinent part:

> No employee or contractor of a recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 504 of the Act or this part, or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, hearing, or proceeding under this part.

5 Simpson further narrowed § 504's application to employment discrimination suits by adding the requirement that a plaintiff be an intended beneficiary of federal financial assistance in addition to the requirement that a primary objective of the federal assistance be to provide employment.

6 In addition, several district courts have agreed that the Trageser analysis applies but found that there was a genuine issue of material fact as to whether a primary objective of the federal financial assistance was to provide employment. E.g., Cain v. Archdiocese of Kansas City, Kansas, 508 F.Supp. 1021 (D. Kan. 1981); Meyerson v. State of Arizona, 507 F.Supp. 859 (D. Ariz. 1981); Guertin v. Hackerman, 496 F.Supp. 593 (S.D. Tex. 1980). The court does not believe that the issue of whether a primary objective of the UMTA is to provide employment is a question of fact. Consequently, and because the record is fully developed on this issue, the court decides the question as a matter of law.

[7] Several district court cases have granted or denied relief for alleged § 504 violations against employees of a program receiving federal financial assistance without addressing the question of whether a primary objective of the federal financial assistance was to provide employment. E.g., Upshur v. Love, 474 F.Supp. 332 (N.D. Cal. 1979) (denying relief); Duran v. City of Tampa, 451 F.Supp. 954 (M.D. Fla. 1978) (granting relief).

[8] This court finds nothing in Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981) to indicate to the contrary. Although Prewitt referred to "Section 504's proscription against handicap employment discrimination," id. at 304, that case dealt with alleged employment discrimination against a federal employee and had no occasion to mention the restriction contained in § 604 of Title VI.

NO. 82-1749

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID
TRANSIT AUTHORITY,

Petitioner,

v.

GEORGE C. KELLY,

Respondent.

On Writ of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Eugene Novy
Counsel of Record
Penelope W. Rumsey
NOVY & RUMSEY
1348 Ponce de Leon Avenue
Atlanta, Georgia 30306
(404) 378-0000

Attorneys for Respondent

Dated: July 29, 1983

QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

May an employee maintain an action against his employer for discriminatory employment practices on the basis of handicap under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, if the primary purpose for which the employer receives federal financial assistance is something other than to provide employment.

PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.

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IN THE
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METROPOLITAN ATLANTA RAPID
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Petitioner,

v.

GEORGE C. KELLY,

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent, GEORGE C. KELLY, respectfully prays that the Petition For Writ of Certiorari filed in the above-styled matter to review the decision of the United States District Court of Appeals For The Eleventh Circuit be denied.

OPINIONS BELOW

The judgments and opinions in this case of the United States District Court For The Northern District of Georgia, Atlanta Division, and The United States Court of Appeals for the Eleventh Circuit are unreported, but copies are attached to the Petition for Writ of Certiorari filed in this case as Items A-1, A-2, and A-3.

JURISDICTION

The Respondent does not dispute the Petitioner's statement that this Court has jurisdiction to consider its Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Petitioner correctly quotes the statutes to be construed in this case. They are §504 of Rehabilitation Act of 1973, as amended, 29 U.S.C. §794; §505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a; §604 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3.

STATEMENT OF THE CASE

For the purposes of this Response, the Respondent does not dispute Petitioner's Statement of the Case. In summary, the Respondent filed a Complaint in the United States District Court For The Northern District of Georgia, Atlanta Division, alleging that the Petitioner, his employer, had discriminated against him in its employment practices because of his handicap in violation of § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. The Petitioner answered and filed a Motion for Summary Judgment alleging that the Respondent did not have standing to maintain an action against it for discriminatory employment practices based on handicap under § 504 of the Rehabilitation Act because the primary purpose for which it received federal funds was for something other than providing employment. For the purposes of this Motion for Summary Judgment, the Petitioner did not dispute the allegations of the Respondent that the Respondent had been discriminated against by it because of his handicap, and the Respondent did not dispute the allegations of the Petitioner that the primary purpose for which it received federal funds was for something other than providing employment.

The District Court granted the Petitioner's Motion for Summary Judgment on the narrow legal

issue stated above, and the United States Court of Appeals for the Eleventh Circuit reversed the District Court on the basis of its decision in Jones v. MARTA, 681 F.2d 1376 (11th Cir. 1982) petition for cert. filed, 51 U.S.L.W. 3535 (Jan. 11, 1983) (No. 82-1159).

GRANTING THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE WOULD HAVE NO USEFUL PURPOSE AND, THEREFORE, SHOULD BE DENIED.

I. THE KEY ISSUES WHICH THE PETITIONER HAS REQUESTED THE SUPREME COURT TO REVIEW IN THE INSTANT CASE ARE IDENTICAL TO THOSE ISSUES RAISED IN LESTRANGE V. CONSOLIDATED RAIL COPR., 687 F.2d 757 (3rd Cir. 1982), CERT. GRANTED, 51 U.S.L.W 3611 (Feb. 22, 1983) (N. 82-862), IN WHICH CASE THE SUPREME COURT HAS ALREADY GRANTED A WRIT OF CERTIORARI.

In its statement of "Reasons for Granting the Writ" the Petitioner maintains that there is a split between the Circuits on the controlling issue in this case, namely, whether an employee has standing to bring a private action against an employer under § 504 of the Rehabilitation Act of 1973 when although the employer receives federal financial assistance, employment is not a primary purpose of the federal funding. It is true that there is a split on this issue. While the Third Circuit[1] and the Eleventh Circuit[2] have ruled that an employee

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1 LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir. 1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983) No. 82-862).

does have standing to bring such an action, the Fourth Circuit[3/], the Eighth Circuit[4/], and the Ninth Circuit[5/] have ruled to the contrary.

Presumably, to address this split the Supreme Court has granted a Writ of Certiorari in LeStrange, supra. As the central issue in LeStrange, supra, and the instant case is identical, to grant the Petition for Writ of Certiorari in the instant case would add nothing to the Court's analysis in this matter.

Further, in its "Reasons for Granting The Writ," the Petitioner states that there are two other issues in the instant case which must be addressed to clarify the application of § 504 of the Rehabilitation Act. First, does § 504 afford a private cause of action under any circumstances, and secondly, if so, exactly what is the scope of the right or the test to be utilized to determine that scope.

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2 Jones v. MARTA, 681 F.2d 1376 (11th Cir. 1982) petition for cert. filed, 51 U.S.L.W. 3535 (Jan. 11, 1983) (No. 82-1159).

3 Trageser v. Libbie Rehabilitation Center, Inc., 590 F. 2d 87 (4th Cir. 1978), cert. denied. 442 U.S. 947 (1979).

4 Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8thCir. 1980), cert. denied, 449 U.S. 892 (1980).

5 Scanlon v. Atascadero State Hospital, 67 F.2d 1271 (9th Cir. 1982).

The issue of whether a private right of action exists in a case brought under § 504 of the Rehabilitation Act is not properly before the Supreme Court in the instant case as the District Court's opinion and the Eleventh Circuit's opinion were based on other grounds and did not deal with this issue. Further, even if the issue was properly before this Court, it has been firmly established that such a private cause of action exists. Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 1957 (1979) states "the critical language in Title VI ha(s) already been construed as creating a private remedy," citing Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967) cert. denied, 388 U.S. 911, 87 S. Ct. 2116. As § 505 of the Rehabilitation Act states that the "remedies" set forth in Title VI shall be available to any person aggrieved under § 504 of the Rehabilitation Act, the remedy of a private action under Title VI as approved in Cannon, supra, would be available under § 504 of the Rehabilitation Act.

Finally, the issue of the scope of the private action under § 504 of the Rehabilitation Act, is squarely before the Supreme Court pursuant to the Second Circuit's opinion in LeStrange, supra, at 769, and the Supreme Court may address that issue in its opinion in LeStrange.

Thus, as the two issues which have been raised by the Petitioner on which there is an actual split between the Circuits, are identical to the issues raised in LeStrange, supra, and as this Court has already granted Certiorari in LeStrange, granting the Petition for Writ of Certiorari in the instant case would not assist this Court in the formulation of its opinion as to the application of § 504 of the Rehabilitation Act.

II. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN THE INSTANT CASE IS IN ACCORD WITH THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN LESTRANGE, SUPRA, AND AS LESTRANGE, WILL BE AFFIRMED BY THE SUPREME COURT, NO INJUSTICE WILL BE DONE BY DENYING THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE.

The central issue in LeStrange, supra, and in the instant case involves the application of a federal statute, the Rehabilitation Act of 1973. It is axiomatic that in intepreting a statute, a court will first examine the language of the statute itself, and the statute will then be interpreted in the manner consistent with the "plain meaning" of the statutory language. Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979); Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 329 (11th Cir. 1982).

The "plain meaning" of the broad language in § 504 of the Rehabilitation Act forbids an employer receiving federal funds from discriminating against its employees because of handicap, whether or not the purpose of the federal funding is to provide employment. This Court made an analogous ruling in North Haven Board of Education v. Bell, _____, U.S. _____, 102 S. Ct. 1912 (1982), in which it held that pertinent language in § 901(a) of Title IX, which is identical to the pertinent language in § 504 of the Rehabilitation Act, proscribes employment discrimination in a federally-funded education program.

The Petitioner, however, notes that Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (1978), cert. denied, 442 U.S. 947 (1979), and the cases which have followed it, hold that 42 U.S.C. 2000d-3 is made applicable to the Rehabilitation Act by § 505 of the Rehabilitation Act, and that 42 U.S.C. § 2000d-3 limits the application of the Rehabilitation Act in private actions to employers who receive federal funding for the primary purpose of providing employment.

First, it seems doubtful that § 505 of the Rehabilitation Act which states that the "remedies, procedures and rights" set forth in Title VI are applicable to § 504 of the Rehabilitation Act, would

make any provisions in Title VI, which would substantively limit the scope of the Rehabilitation Act, applicable to the Rehabilitation Act. To limit the substantive aspects of the Rehabilitation Act by the substantive provisions of Title VI would make the Rehabilitation Act a functional nullity.

However, there is no need to address that point in resolving the issues here in dispute, as the language in 42 U.S.C. § 2000d-3, specifically limits only actions by a "department or agency" and not a private action.

The fact that the "plain meaning" of the statutes in question provides the proper interpretation of these statutes is reinforced by the legislative and post-enactment history of the statutes. These topics are discussed in detail in the opinion of the Second Circuit in LeStrange, supra, and in the opinion of the Eleventh Circuit in Jones, supra.

Pursuant to the above rationale, the Respondent respectfully submits that the Second Circuit's opinion in LeStrange, which this Court will review on Certiorari, will be affirmed by this Court. If LeStrange is affirmed, no injustice will be done in the instant case by denying the Petition for Writ of Certiorari, as the Eleventh Circuit's opinion in this case is in accord with LeStrange.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this case because granting the same would not act to anyone's benefit. First, as the issue raised in the instant case is identical to the issue raised in LeStrange, supra, which the Supreme Court has already agreed to review on Writ of Certiorari, granting the Petition for Writ of Certiorari in the instant case would not benefit the Court in clarifying the issue in question. Secondly, as the opinion in the instant case is in accord with the opinion in LeStrange, and the language, legislative history and post-enactment history of the statutes in question, together with the analogous precedent set in North Haven, supra, indicate that the Second Circuit's opinion in LeStrange will be affirmed by this Court, refusing to grant the Petition for Writ of Certiorari in this case will not act as an injustice to the Petitioner.

Therefore, on the basis of the foregoing, the Petition for Writ of Certiorari to review the judgment and the opinion of the Eleventh Circuit in this case should be denied.

Respectfully submitted,

NOVY & RUMSEY

By: _____
Eugene Novy

By: _____
Penelope W. Rumsey

AFFIDAVIT OF MAILING

Personally appeared before the undersigned officer, duly authorized to administer oaths, EUGENE NOVY, who states that he is Counsel of Record for the Respondent in this case and that he has timely filed the original and nine (9) copies of the foregoing "Response to Petition For Writ of Certiorari" with the Clerk of the Supreme Court, pursuant to Rule 28.2 of the Supreme Court, by placing the same in the United States mail on July 29, 1983, with adequate postage thereon, addressed to the Clerk of the Supreme Court, Supreme Court of The United States, Washington, D. C. 20543.

THIS, the 29th day of July, 1983.

Eugene Novy

SWORN and SUBSCRIBED TO
before me this 29th day of
July, 1983.

Notary Public
Fulton County, Georgia
My Commission Expires: July 25, 1987

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date served a copy of the within and foregoing "Response To Petition For Writ of Certiorari" upon all parties in this lawsuit by forwarding a copy to all counsel of record as follows:

Paul A. Howell, Jr., Esquire
Counsel of Record
W. Stell Huie, Esquire
KUTAK ROCK & HUIE
1200 Standard Federal Savings Building
Atlanta, Georgia 30303

Frances M. Toole
Brenda K. Pollard
Attorneys-at-Law
MARTA Office of Staff Counsel
2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlanta, Georgia 30365-4301

Attorneys for Petitioner

by placing same in the United States mail with sufficient postage thereon to insure proper delivery.

THIS 29th day of July, 1983.

Eugene Novy

1348 Ponce de Leon Avenue
Atlanta, Georgia 30306
(404) 378-0000

CFRB

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Petitioner,

-vs-

GEORGE C. KELLY,

Respondent.

CASE NO. 82-1749

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the Respondent, GEORGE C. KELLY, and pursuant to Rule 46 of the Supreme Court, moves this Court to allow him to respond to the Petition for Writ of Certiorari filed herein, and should such Petition be granted, to respond to Petitioner's Brief on the merits, in forma pauperis, by filing one typewritten copy of his Briefs, in accordance with Rule 39 of the Supreme Court. In support of this Motion, the Respondent submits his Affidavit attached hereto pursuant to Rule 46.1 of the Supreme Court, Fed. Rules App. Proc. Form 4, and 28 U.S.C. § 1915.

THIS 29th day of July, 1983.

NOVY & RUMSEY
Attorneys for Respondent

By: _____
Eugene Novy

By: _____
Penelope W. Rumsey

1348 Ponce de Leon Avenue
Atlanta, Georgia 30306
(404)378-0000

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,	:	
Petitioner,	:	
-vs-	:	CASE NO. 82-1749
GEORGE C. KELLY,	:	
Respondent.	:	

RESPONDENT'S AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, GEORGE C. KELLY, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my Motion to Proceed in Forma Pauperis by submitting Briefs in accordance with Rules 39 and 46 of the Supreme Court, I state that because of my poverty I am unable to pay the costs of having forty-three (43) copies of my Response to Petitioner's Petition for Writ of Certiorari printed, and further would be unable to pay the costs of having my Brief on the merits printed should the Petition for Writ of Certiorari be granted; and that on the basis of the following facts I request this Court to allow me to proceed in forma pauperis.

I further swear that the following information relating to my financial inability to submit printed Briefs in the numbers required by Rules 22 and 35 of the Supreme Court is true and correct:

1.

I am unemployed. My last employment was with the Petitioner, METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, as a traffic checker, earning a base salary of approximately $1,000.00 per month. The Petitioner terminated me on July 15,

1977, and it is the basis of my Complaint in this case and that the Petitioner discriminated against me because of my handicap in this termination.

2.

Since my employment was terminated on July 15, 1977, my only source of income has been disability benefits which I receive in the amount of $559.00 per month.

3.

My wife and I have a joint checking and savings account. There is no money in the savings account and there is a present balance of $300.00 in the checking account. Each month I deposit my disability check into the checking account and use this money to pay my wife's and my bills and living expenses. This is the source of the present balance in the checking account which will be spent on living expenses. In addition to my wife's and my day-to-day living expenses, I have indebtednesses totaling approximately $3,000.00, which I am attempting to pay off on a monthly basis.

4.

My wife and I own our home jointly, which has an approximate value of $50,000.00. We also own an automobile, a 1970 Hornet, with a market value of approximately $300.00. I have no other assets of any value.

5.

My wife is dependent upon me for support.

6.

I applied to The Honorable William C. O'Kelly, Judge of the United States District Court for the Northern District of Georgia, Atlanta Division, to be allowed to proceed to

the United States Court of Appeals for the Eleventh Circuit in forma pauperis to appeal the Order granting Petitioner's Motion for Summary Judgment in this case. He denied my motion. My son voluntarily funded the cost of printing the Brief for the Eleventh Circuit and ordering the Record required on appeal.

7.

The Supreme Court has required that my attorney respond to the Petition for Writ of Certiorari filed in this case by August 1, 1983. The estimates which my attorney has received for printing and binding this Brief in the numbers required by the Rules of the Supreme Court range from $600.00 to $800.00. I do not have sufficient funds to pay this expense, and if I could borrow this money, I do not have sufficient income to repay it.

I understand that a false statement or answer given in this Affidavit would subject me to penalties for perjury.

George C. Kelly
GEORGE C. KELLY, Respondent

SWORN and SUBSCRIBED to before me
this 27th day of July, 1983.

Notary Public
Fulton County, Georgia

My Commission Expires: July 25, 1987

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date served a copy of the within and foregoing "Respondent's Motion To Proceed In Forma Pauperis" and "Respondent's Affidavit In Support of Motion To Proceed in Forma Pauperis" upon all parties in this lawsuit by forwarding a copy to all counsel of record as follows:

Paul A. Howell, Jr., Esquire
Counsel of Record
W. Stell Huie, Esquire
KUTAK ROCK & HUIE
1200 Standard Federal Savings Building
Atlanta, Georgia 30303

Frances M. Toole
Brenda K. Pollard
Attorneys-at-Law
MARTA Office of Staff Counsel
2200 Peachtree Summit
401 West Peachtree Street, N.E.
Atlana, Georgia 30365-4301

Attorneys for Petitioner

by placing same in the United States mail with sufficient postage thereon to insure proper delivery.

THIS 29th day of July, 1983.

Eugene Novy

1348 Ponce de Leon Avenue
Atlatna, Georgia 30306
(404) 378-0000